

MICHIGAN SUPREME COURT



Office of Public Information

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FOR IMMEDIATE RELEASE

FAITH-BASED SCHOOL'S CONSTITUTIONAL CLAIM AT ISSUE IN CASE MICHIGAN SUPREME COURT WILL HEAR THIS WEEK

Ann Arbor Township officials denied request to use former day care site for Catholic Montessori school; school claims it was treated differently than secular organization

LANSING, MI, December 7, 2009 – A faith-based school's variance application – and whether Ann Arbor Township officials violated the Michigan and U.S. Constitution in denying the application – are at issue in a case that the Michigan Supreme Court will hear in oral arguments this week.

In [*Shepherd Montessori Center Milan v Ann Arbor Charter Township*](#), the plaintiff sought to use a former day care center site in an office park for a Catholic Montessori school. Township officials denied the school's variance request, stating that the school, which included kindergarten through third grade, was prohibited by a local zoning ordinance. The school sued; among the issues raised in the lawsuit was the school's claim that the township treated it differently than a similarly situated secular organization, violating the school's constitutional right to equal protection. While the trial court rejected that claim, the Court of Appeals held that the township's application of the local zoning ordinance did violate the school's right to equal protection. According to the Court of Appeals, the township had conceded that the Catholic school was similarly situated to the day care center that had previously operated in that space. "[D]efendants failed to offer a reason for refusing to permit plaintiff to operate its school in the same space that [the day care center] had operated its day care program," the appellate panel stated. "Further, defendants offered no evidence to show that their denial of plaintiff's variance request was narrowly tailored to achieve a compelling governmental interest." The township has argued that the school is not similarly situated to the day care center, and that the school has not produced any evidence that the township's variance denial was based on the school's religious character.

The Court will also hear [*People v Richmond*](#), in which the prosecutor dismissed criminal charges against the defendant, saying that the prosecution could not proceed after the trial court suppressed most of the evidence that police officers obtained during a search. The trial court based its ruling on a 2006 Court of Appeals ruling, *People v Keller*. While the prosecutor appealed the trial court's decision, the Michigan Supreme Court reversed *Keller*; based on the [*Supreme Court's ruling*](#), the Court of Appeals reversed the trial court in Richmond and reinstated the charges against the defendant. On appeal to the Supreme Court, the defendant contends that the prosecutor could not legitimately appeal the trial court's ruling after dismissing the charges.

The remaining 11 cases that the Court will hear involve civil procedure, criminal,

governmental immunity, insurance, tax, tort, Whistleblower's Protection Act, and worker's compensation issues.

Court will be held on **December 8 and 9** in the Supreme Court's courtroom on the sixth floor of the Michigan Hall of Justice in Lansing. Oral arguments will begin each day at **9:30 a.m.** The Court's oral arguments are open to the public.

Please note: the summaries that follow are brief accounts of complicated cases and may not reflect the way that some or all of the Court's seven justices view the cases. The attorneys may also disagree about the facts, the issues, the procedural history, or the significance of their cases. Briefs in the cases are available online at http://www.courts.michigan.gov/supremecourt/Clerk/MSC_orals.htm. For further details about the cases, please contact the attorneys.

Tuesday, December 8
Morning Session

PEOPLE v RICHMOND ([case no. 136648](#))

Prosecuting attorney: Timothy A. Baughman/(313) 224-5792

Attorneys for defendant Edwin Dewayne Richmond: Matthew R. Abel/(248) 866-0864, Alan L. Kaufman/(248) 497-6912

Attorney for amicus curiae Attorney General Michael A. Cox: Joel D. McGormley/(517) 373-4875

Attorney for amicus curiae Prosecuting Attorneys Association of Michigan: Donald A. Kuebler/(810) 257-3854

Trial Court: Wayne County Circuit Court

At issue: After the trial court made an unfavorable evidentiary ruling, the prosecutor dismissed all charges against the defendant. The prosecutor appealed the unfavorable ruling to the Court of Appeals, which reversed the trial court and reinstated the charges against the defendant. Did the prosecutor's dismissal of the charges in the trial court render moot the prosecutor's subsequent appeal?

Background: After receiving an anonymous tip that Edwin Richmond was growing marijuana, Livonia police officers searched trash at the curb outside Richmond's home and found a marijuana stem and mail addressed to him. The police obtained a warrant to search Richmond's home, where they discovered guns and marijuana plants. Richmond was charged with manufacturing 20 to 200 marijuana plants, possession with intent to deliver marijuana, and felony-firearm. Richmond filed a motion to suppress, arguing that the anonymous tip and the evidence recovered in the trash were insufficient to support the issuance of a search warrant, citing the Court of Appeals decision in *People v Keller*, 270 Mich App 446 (2006). The trial court granted Richmond's motion, finding that there was no evidence that the anonymous caller spoke with personal knowledge. When the caller's statements to the police were set aside, the only other evidence supporting the search of Richmond's house was the single marijuana stem, which was inadequate to support a search warrant, the judge concluded. The prosecutor announced that this decision left no evidence that would allow the prosecution to continue; the case against Richmond was dismissed. The prosecutor then appealed to the Court of Appeals. By the time the prosecutor's brief was filed, the Michigan Supreme Court had reversed the *Keller*

decision. In an unpublished per curiam opinion, which noted that *Keller* had been reversed, the Court of Appeals reversed the trial court's ruling and reinstated the charges against Richmond. Richmond appealed to the Supreme Court. He challenged the Court of Appeals analysis, and also challenged the prosecutor's ability to appeal the search warrant ruling, arguing that the appeal was moot because the prosecutor had dismissed the case. Ultimately, after initially denying leave to appeal, the Supreme Court granted leave, "limited to the issue of whether the prosecutor's dismissal of the charges rendered moot the prosecutor's subsequent appeal to the Court of Appeals."

PEOPLE v WILCOX ([case no. 136956](#))

Prosecuting attorney: Mark G. Sands/(517) 373-4875

Attorney for defendant Larry Eugene Wilcox: Christopher M. Smith/(517) 334-6069

Trial Court: St. Joseph County Circuit Court

At issue: The defendant was convicted of first-degree criminal sexual conduct. The minimum sentence guidelines were calculated to be 27 to 56 months. Because the defendant had a prior conviction for criminal sexual conduct, he was sentenced as a repeat offender under MCL 750.520f, which mandated a minimum sentence of at least five years. The defendant was sentenced to 10 to 40 years in prison. Do the legislative sentencing guidelines apply when a criminal statute, such as MCL 750.520f, sets forth its own mandatory minimum sentence? Is the defendant entitled to be resentenced?

Background: Larry Eugene Wilcox was charged with, and convicted of, one count of first-degree criminal sexual conduct, MCL 750.520b(1)(a). Because Wilcox had previously been convicted of second-degree criminal sexual conduct, the prosecutor sought an enhanced sentence under MCL 750.520f. That statute states in part that if "a person is convicted of a second or subsequent offense under section 520b, 520c, or 520d, the sentence imposed under those sections for the second or subsequent offense shall provide for a mandatory minimum sentence of at least 5 years." Wilcox's minimum sentence guidelines were calculated to be 27 to 56 months. MCL 769.34(2)(a) states that if "a statute mandates a minimum sentence for an individual sentenced to the jurisdiction of the department of corrections, the court shall impose sentence in accordance with that statute. Imposing a mandatory minimum sentence is not a departure under this section." In this case, the trial court imposed a minimum sentence of 10 years, sentencing Wilcox to 10 to 40 years. Wilcox appealed, arguing in the Court of Appeals that the minimum sentence imposed by the trial court was too high. But the Court of Appeals affirmed the sentence in a published per curiam opinion. MCL 750.520f did not require that the minimum sentence be exactly five years, it required only that the minimum sentence be at least five years, the appellate court said. The requirements of this statute were satisfied by the sentence in this case, the Court of Appeals held, because the ten year minimum sentence was "at least" five years. The Court of Appeals also held that the sentence was not a departure from the guidelines. Wilcox appeals.

SHEPHERD MONTESSORI CENTER MILAN v ANN ARBOR CHARTER TOWNSHIP, et al. ([case no. 137443](#))

Attorneys for plaintiff Shepherd Montessori Center Milan: Robert L. Bunting/(248) 628-5150, Robert Charles Davis/(586) 469-4300

Attorney for defendants Ann Arbor Charter Township, Ann Arbor Charter Township Zoning Official, and Ann Arbor Charter Township Zoning Board of Appeals: G. Christopher Bernard/(734) 761-3780

Attorney for amicus curiae Michigan Townships Association: John K. Lohrstorfer/(269) 382-4500

Trial Court: Washtenaw County Circuit Court

At issue: The defendants denied the plaintiff's request for a variance to allow a Catholic Montessori school to operate in an office park zoning district. The plaintiff filed a lawsuit alleging denial of equal protection and other causes of action. The trial court granted the defendants' motion for summary disposition. The Court of Appeals held that the plaintiff was entitled to summary disposition on its equal protection claim. Did the Court of Appeals apply the correct standard of review in determining that the defendants violated the plaintiff's right to equal protection? Did the defendants violate the plaintiff's right to equal protection in denying the plaintiff's request for a variance?

Background: Shepherd Montessori Center Milan sought to convert a day care center in the Domino's Farm Office Park in Ann Arbor Township to a Catholic Montessori school for kindergarten through grade 3. In a letter dated May 1, 2000, the township's zoning official informed Shepherd Montessori that its request for a variance was denied because operation of a primary school in the office park was prohibited by the local zoning ordinance. Shepherd Montessori then sued the township, the zoning official and the zoning board of appeals. The lawsuit raised a number of issues, including Shepherd Montessori's allegation that the township defendants treated it differently than a similarly situated secular organization, thereby violating its federal and state constitutional rights to equal protection. Both sides filed motions for summary disposition. The trial court denied Shepherd Montessori's motion, but granted the township defendants' motion, dismissing the case. With regard to the equal protection issue, the trial court held that Shepherd Montessori had produced no evidence that it was treated differently than a non-religious entity. In a published opinion, the Court of Appeals reversed the trial court's equal protection ruling, holding that disputed factual issues prevented the trial court from declaring as a matter of law that Shepherd Montessori did not have a valid equal protection claim. The parties conducted additional discovery in the trial court, and then filed new motions for summary disposition. Once again, the trial court dismissed the lawsuit. In a published opinion, the Court of Appeals held that the township defendants' application of the zoning ordinance violated Shepherd Montessori's equal protection rights, and that Shepherd Montessori was entitled to entry of a judgment in its favor. The township defendants appealed to the Supreme Court, which vacated the judgment of the Court of Appeals and remanded the case to the Court of Appeals for reconsideration. On remand, the Court of Appeals reaffirmed its earlier ruling in Shepherd Montessori's favor. On the equal protection issue, the Court of Appeals ruled that the township defendants conceded that Shepherd Montessori was similarly situated to a daycare that had previously been approved to operate in the space that Shepherd Montessori sought to use. The Court of Appeals further concluded that the township defendants offered no evidence to show that their denial of Shepherd Montessori's variance request was narrowly tailored to achieve a compelling governmental interest. The court remanded the case to the trial court for entry of judgment in favor of Shepherd Montessori. The township defendants appeal.

Afternoon Session

SUPERIOR HOTELS, L.L.C. v TOWNSHIP OF MACKINAW ([case no. 138696](#))

Attorney for petitioner Superior Hotels, L.L.C.: Steven H. Lasher/(517) 371-8100

Attorney for respondent Township of Mackinaw: Timothy P. MacArthur/(231) 627-3163

Attorney for amicus curiae Michigan State Tax Commission: Steven B. Flancher/(517) 373-3203

Attorney for amicus curiae Michigan Townships Association: Robert E. Thall/(269) 382-4500
Tribunal: Michigan Tax Tribunal

At issue: The petitioner built a motel complex on property that it owned. The respondent recorded the assessed value of the property on the assessment roll, but failed to increase the taxable value of the property. When this came to light, the respondent asked the State Tax Commission to order a correction to the taxable value of the property pursuant to MCL 211.154(1), which permits correction of the assessed value of property incorrectly reported or omitted from the assessment roll. The STC made the correction, but the Tax Tribunal reversed, ruling that the STC had no jurisdiction to make the correction because the property was not improperly reported or omitted from the assessment roll, and the assessment value was correctly recorded. In a published opinion, the Court of Appeals reversed the Tax Tribunal's decision. Does the State Tax Commission have jurisdiction, pursuant to MCL 211.154(1), to correct the taxable value of real property erroneously recorded on the local assessment roll?

Background: Superior Hotels, L.L.C. built a motel on property that the company owns in Mackinaw Township, Cheboygan County. Construction began in 1997 and was completed in 1998. The township's tax assessor assessed the property on December 31, 1997 for tax year 1998; the motel was assessed as 50 percent completed, and the assessed value and taxable value of the property were calculated accordingly. A year later, the township's tax assessor assessed the motel as 100 percent completed and the assessed value of the property was doubled. However, the assessor failed to correct the taxable value of the property; the taxable value was listed as the same for tax year 1999 as it had been for tax year 1998, with inflationary adjustments, so that the taxable value listed was approximately half of what it should have been. For each subsequent tax year through 2003, the township based the new taxable value on the previous year's erroneous value. When the township learned of the error, it asked the State Tax Commission to change the taxable value of the property, pursuant to MCL 211.154(1), which permits correction of the assessed value of property that has been incorrectly reported or omitted for any previous year. The STC granted the township's request, increasing the taxable value for each year to reflect the correct amount based on the assessed value, essentially doubling the taxable value of the property. Superior Hotels filed a petition with the Michigan Tax Tribunal, claiming that the STC did not have authority under MCL 211.154(1) to change the taxable value of the property, because the value of the property had been properly assessed, but there was only a mistake in recording the taxable value of the property. In response, the township argued that § 154(1) gives the STC the authority to correct an incorrectly reported assessed or taxable value of property. The Tax Tribunal ruled in favor of Superior Hotels, finding that the STC did not have jurisdiction to correct the taxable value of the property. But in a published opinion, the Court of Appeals reversed the Tax Tribunal and reinstated the STC's increase in the taxable value of Superior Hotels' property. The Court of Appeals concluded that the precedent relied on by the Tax Tribunal had been abrogated by legislative changes to MCL 211.154(1). The panel also reasoned that § 154(1) permits correction of the taxable value as well as the assessed value of property. In addition, the appeals court held, the property at issue qualified as "omitted" property because the legal definition of "omitted" property in the general property tax act includes new construction not previously included in the true cash value of assessed property. As a result, correction of the taxable value was proper, the Court of Appeals stated. Superior Hotels appeals.

BERKEYPILE v WESTFIELD INSURANCE COMPANY, et al. ([case no. 137353](#))

Attorney for plaintiff Mary I. Berkeypile: Donald M. Fulkerson/(734) 467-5620

Attorney for defendant Westfield Insurance Company: Deborah A. Hebert/(248) 355-4141

Trial Court: Jackson County Circuit Court

At issue: The plaintiff, who was injured in a five-vehicle accident, settled with three drivers for \$325,500. The plaintiff then sued her insurer, seeking uninsured motorist benefits based on the negligence of the two drivers who could not be identified. The insurer denied liability because the plaintiff's total settlement exceeded her \$300,000 uninsured motorist coverage. The trial court granted summary disposition for the insurer, but the Court of Appeals reversed in a published opinion that interprets the uninsured motorist endorsement as affording coverage in excess of the settlements, so long as the plaintiff's total damages exceed the settlements. Did the Court of Appeals correctly interpret the contract?

Background: Mary Berkeypile was injured in a multi-vehicle accident involving five other drivers; at the time, she was riding in a vehicle insured by Westfield Insurance Company. Berkeypile secured settlements from the three identified drivers, totaling \$325,500. She then sued Westfield and another insurance company, seeking an additional \$300,000 in uninsured motorist benefits – the maximum amount allowed by the policy – for the negligence of two unidentified “hit and run” drivers involved in the accident. Westfield contended that Berkeypile was not entitled to uninsured motorist benefits under its policy because she had already recovered more than the \$300,000 limit in her settlement with the other drivers. Paragraph D of the Westfield policy on uninsured motorist coverage, which governs the limits of insurance, states that Westfield will not make “duplicate payments” for any element of loss for which payment has been made by a legally responsible party. Paragraph E(1)(a) provides that “[i]f there is other applicable insurance available under one or more policies or provisions of coverage . . . [t]he maximum recovery under all coverage forms or policies combined may equal but not exceed the highest applicable limit for any one vehicle under any coverage form or policy providing coverage on either a primary or excess basis.” The trial court ruled in favor of Westfield, reasoning that, under the policy, the insured is entitled to claim uninsured motorist coverage only if other parties responsible are either uninsured or underinsured and contribute less than the total amount of damages sustained by the plaintiff, up to a maximum of the policy's uninsured motorist coverage. Therefore, because Berkeypile recovered more than the \$300,000 uninsured motorist benefits limit in the settlement, Westfield owed Berkeypile nothing under its policy, the trial court concluded. Berkeypile appealed and the Court of Appeals reversed in a published opinion. The appellate panel held that the policy language did not support the trial court's analysis. Rather, Westfield is liable to Berkeypile for uninsured motorist benefits equal to the amount by which Berkeypile's overall damages exceeded the settlement proceeds, subject to the policy limit and any allocation of fault made by the trier of fact, the Court of Appeals held. Westfield appeals.

Wednesday, December 9

Morning Session

ALLEN v BLOOMFIELD HILLS SCHOOL DISTRICT ([case no. 137607](#))

Attorneys for plaintiffs Charles Allen and Lisa Allen: Arvin J. Pearlman/(248) 356-5000,
Mark R. Granzotto/(248) 546-4649

Attorney for defendant Bloomfield Hills School District: Kevin T. Sutton/(248) 988-5873

Attorney for amicus curiae Attorney General: Ann M. Sherman/(517) 373-6434

Attorney for amicus curiae Brain Injury Association of Michigan (BIAMI) and the Michigan Brain Injury Provider Council (MBIPC): Steven A. Hicks/(517) 394-7500

Attorney for amicus curiae Insurance Institute of Michigan: Kimberlee A. Hillock/(517) 351-6200

Attorney for amicus curiae Michigan Association for Justice: Donna M. MacKenzie/(248) 591-2300

Trial Court: Oakland County Circuit Court

At issue: A train collided with a school bus that maneuvered around a lowered safety gate to enter the railroad crossing. No children were on the bus. The train engineer sued the school district, claiming that he suffers from post-traumatic stress disorder because he thought at the time that he had injured or killed children. The school district moved for summary disposition under MCR 2.116(C)(7) based on governmental immunity, asserting that the plaintiff had not suffered a “bodily injury” within the meaning of the motor vehicle exception to governmental immunity, MCL 691.1405. The trial court granted the motion but the Court of Appeals reversed in a split published opinion. Does post-traumatic stress disorder qualify as a “bodily injury”?

Background: Amtrak engineer Charles Allen was operating a train near the intersection of Kensington and Opdyke roads in the city of Bloomfield Hills when a Bloomfield Hills School District school bus drove around a lowered safety gate and into the railroad crossing at Opdyke Road. The train, which was traveling at about 65 miles an hour, collided with the school bus. Allen stopped the train and ran the half mile back to the accident scene, where he was told that there were no children on the bus, but that the bus driver was severely injured. Allen, who was diagnosed with post-traumatic stress disorder after the accident, alleges that the trauma of seeing the bus and believing he was about to kill children caused him extreme mental anguish. Allen and his wife sued the Bloomfield Hills School District, claiming that Allen suffered a serious impairment of body function as a result of the accident. The school district filed a motion for summary disposition arguing, among other things, that it was protected from suit by governmental immunity. In Michigan, a governmental agency is generally immune from tort liability arising out of the exercise or discharge of its governmental functions. MCL 691.1407(1). This immunity includes a public school district’s operation of a bus system. Governmental immunity is limited by several narrowly drawn exceptions, including one for the operation of motor vehicles: “Governmental agencies shall be liable for bodily injury and property damage resulting from the negligent operation by any officer, agent, or employee of the governmental agency, of a motor vehicle of which the governmental agency is owner” MCL 691.1405 (emphasis added). The school district argued that Allen could not establish that he suffered a “bodily injury” within the meaning of MCL 691.1405, but Allen asserted that his post-traumatic stress disorder satisfied the statutory requirement. He relied on the affidavit of a physician who reviewed Allen’s positron emission tomography (PET) scan and opined that it depicted “decreases in frontal and subcortical activity consistent with depression and post-traumatic stress disorder.” The physician further stated that “the abnormalities in Mr. Allen’s brain as depicted on the September 8, 2006, PET scan are quite pronounced and are clearly different in brain pattern from any of the normal controls. They are also consistent with an injury to Mr. Allen’s brain.” Allen also offered another physician’s report, which stated that post-traumatic stress disorder “causes significant changes in brain chemistry, brain function, and brain structure.” The trial court ruled that the lawsuit was barred by governmental immunity, but the Court of Appeals reversed the trial court’s ruling in a split, published opinion. The Court of Appeals majority held

that Allen presented objective medical evidence that a mental or emotional trauma can result in physical changes to the brain, and that his own brain was injured as a result of the accident. Accordingly, the trial court erred in granting summary disposition to the school district, the majority said. The dissenting judge did not agree that post-traumatic stress disorder can constitute a “bodily injury” within the meaning of MCL 691.1405. Allen’s injury arose from his emotional upset at believing that he injured or killed school children; he did not claim that he suffered any physical impact on his body during the collision, the dissenting judge said. Under these circumstances, the dissenting judge concluded, evidence concerning Allen’s abnormal brain activities could not satisfy the statutory definition of “bodily injury.” The school district appeals.

MYERS v MUFFLER MAN SUPPLY COMPANY, et al. ([case no. 137608](#))

Attorney for plaintiffs Ronnie L. Myers and Mary Myers: Mark R. Granzotto/(248) 546-4649

Attorney for defendant Muffler Man Supply Company: Bennet J. Bush/(810) 695-3700

Trial Court: Genesee County Circuit Court

At issue: The plaintiff’s right arm was amputated when he reached into a soil screening machine, which had not been fully shut off, to clean it. The plaintiff claims that the company that supplied the machine is liable for his injuries, and that the company acted negligently when it removed a machine guard; that alleged negligence caused his injury, the plaintiff contends. The trial court concluded that there were disputed questions of fact, and it denied the company’s motion for summary disposition. The Court of Appeals reversed. Was the defendant’s allegedly negligent act of removing the machine guard a proximate cause of the plaintiff’s injury?

Background: Ronnie Myers was an employee of Clio Sand & Soil, Inc., an excavating and soil hauling enterprise. On June 28, 2003, Myers and another employee attempted to clean a soil screening machine which had become clogged. The machine had not been completely shut off; as Myers was reaching into it, the machine engaged and caught Myers’ right arm, tearing it off below the elbow. Myers and his wife sued a number of defendants, including Muffler Man Supply Company, which had provided the machine to Clio Sand around 1997. For a brief period, Muffler Man was responsible for maintaining and repairing the screening machine, and for instructing Clio Sand’s employees on the operation of the machine. Clio Sand took over this training responsibility at some point in late 1999 or early 2000. A mesh guard and scraper on the machinery were removed soon after Clio Sand acquired the machine and were never replaced, Myers said. Myers argued that Muffler Man had assumed a duty to properly train Clio Sand employees on how to use and clean the screening machine, and that Muffler Man also had the duty to maintain and repair the machine, including replacing and then keeping the mesh guard and scraper in place. Muffler Man’s negligence in carrying out those duties was the proximate cause of his injuries, Myers contended. Muffler Man filed a motion for summary disposition, arguing that the case against it should be dismissed. There was no evidence that Muffler Man had removed any guard or scraper from the machine, and in any event, any guard would have to have been removed to clean the machine, Muffler Man argued. Moreover, Muffler Man asserted, it had never assumed any duty to train Myers and Myers could not point to any negligence or failure to warn by Muffler Man that would be a proximate cause of his injuries. The trial court denied Muffler Man’s motion, concluding that there were disputed issues of fact. The Court of Appeals granted leave to appeal and, in an unpublished per curiam opinion, reversed the trial court’s ruling. The appellate panel rejected Myers’ claim that Muffler Man failed to properly train Clio Sand’s employees on the operation of the screening machine. As to the duty to maintain and repair the machinery, the panel concluded that Muffler Man was entitled to summary disposition

because Myers could not establish that Muffler Man's allegedly negligent actions were the proximate cause of his injury. In other words, Muffler Man's "alleged negligence for failing to replace the guard and scraper did not create or contribute to the hazard from which harm resulted, i.e., cleaning the machine without first turning off the engine." Myers appeals.

STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY v HUDSON ([case no. 137698](#))

Attorney for plaintiff State Farm Mutual Automobile Insurance Company: Marshall I. Lett/(248) 350-3250

Attorneys for defendant Sylvester Hudson: Frederick L. Miller, Christine A. Waid/(248) 858-5850

Trial Court: Wayne County Circuit Court

At issue: The plaintiff insurance company sued the defendant to recover funds that the insurer had paid on an insurance claim. The trial court permitted substituted service. The defendant did not respond to the lawsuit, and the plaintiff obtained a default judgment. The trial court denied the defendant's motion to set aside the default judgment, and its ruling was affirmed on appeal. Was the substituted service proper? Did the trial court abuse its discretion in refusing to set aside the default judgment?

Background: On December 28, 1994, Coyle Hudson was involved in a car accident with another driver, Earl Cayce, insured by State Farm Mutual. After paying benefits to Cayce, State Farm sued Hudson, as well as Hudson's brother Sylvester and Yvonne Davis, the alleged owners of the car Hudson had driven. According to State Farm, it attempted to serve Sylvester Hudson at the address on the most recent vehicle registration and at Coyle's address, but these attempts were unsuccessful. State Farm obtained the trial court's permission to use substituted service for Sylvester Hudson by posting and by mailing a copy of the complaint and summons to Coyle Hudson's address. Sylvester Hudson claims that he never received this notice. He did not respond to the lawsuit, and a default judgment was entered against him. Hudson filed a motion to set aside the default judgment. MCR 2.603(D) provides: "A motion to set aside a default or a default judgment, except when grounded on lack of jurisdiction over the defendant, shall be granted only if good cause is shown and an affidavit of facts showing a meritorious defense is filed." State Farm argued that it followed the court rules in obtaining substituted service, and that service at Sylvester Hudson's brother's house was reasonably calculated to provide him with actual notice of the lawsuit. Sylvester Hudson told the district court that he had lived at the same address in Auburn Hills since 1990, and that public records, such as tax records, would have readily confirmed his location. Hudson also claimed that he was not the owner of the vehicle at the time of the accident. The trial court denied Hudson's motion to set aside the default judgment. On appeal to the circuit court, Hudson argued that the trial court should have set aside the default judgment, because there was good cause to do so based on the fact that he was not properly served and because he had meritorious defenses. He also argued that the statute of limitations had expired. The circuit court affirmed the trial court's ruling. While acknowledging that State Farm could have done more to learn Hudson's true address, the circuit court nevertheless found that the trial court did not abuse its discretion in allowing substituted service. It also rejected Hudson's claim of meritorious defenses. In an unpublished opinion, the Court of Appeals affirmed. The appeals court was not persuaded by Hudson's argument that service was not proper, and it rejected his claims of "good cause" and "meritorious defenses" to set aside the default judgment under MCR 2.603(D). Hudson appeals.

BEZEAU v PALACE SPORTS & ENTERTAINMENT, INC. ([case no. 137500](#))

Attorneys for plaintiff Andre Bezeau: Peter B. Bundarin/(734) 455-9100, John A.

Braden/(231) 924-6544

Attorney for defendant Palace Sports & Entertainment, Inc.: Martin L. Critchell/(248) 593-2450

Attorney for amicus curiae Michigan Association for Justice: Daryl C. Royal/(313) 730-0055

Tribunal: Workers' Compensation Appellate Commission

At issue: In 2000, the plaintiff, a resident of Canada, was injured in Maine. He sought Michigan worker's compensation benefits. In 2007, while his case was pending, the Michigan Supreme Court interpreted the worker's compensation act's statute concerning jurisdiction over out-of-state injuries, MCL 418.845, as giving Michigan jurisdiction over an out-of-state injury if the contract of hire was made in Michigan and the claimant was a resident of Michigan at the time of injury. *Karaczewski v Farbman Stein Co*, 478 Mich 28 (2007). Should MCL 418.845's jurisdictional standard, as interpreted in *Karaczewski*, be applied in this case?

Background: Andre Bezeau, a professional hockey player, signed a three-year contract with the Detroit Vipers in 1998. At that time, he was a Michigan resident. While on loan from the Vipers to the Providence Rhode Island Bruins, Bezeau was allegedly injured in the first game of the season, on October 6, 2000, in Providence. At that time, Bezeau was a resident of New Brunswick, Canada. Bezeau sought worker's compensation benefits from the Vipers, but a worker's compensation magistrate denied his request. Bezeau's claim was reviewed by the Workers' Compensation Appellate Commission, and then the Court of Appeals, which remanded the case back to the WCAC for further review. The WCAC in turn remanded the case to the magistrate to determine, upon the taking of additional proofs, whether Bezeau's condition after the October 6, 2000 injury was medically distinguishable from a pre-existing condition that he had. While the case was on remand to the magistrate, the Michigan Supreme Court issued its decision in *Karaczewski v Farbman Stein Co*, 478 Mich 28 (2007). In *Karaczewski*, the Supreme Court held that MCL 418.845 requires a claimant for Michigan worker's compensation benefits to demonstrate that the contract of hire was made in Michigan and that the claimant was a resident of Michigan at the time of the injury. In light of this decision, defendant Palace Sports & Entertainment, Inc. raised, for the first time, the issue of subject matter jurisdiction, arguing that Bezeau's case had to be dismissed for lack of jurisdiction under MCL 418.845. The magistrate agreed. Because Bezeau was a resident of New Brunswick at the time of injury, said the magistrate, and the injury occurred in Rhode Island, there was no jurisdiction on the part of Michigan's worker's compensation system. The magistrate concluded that Bezeau's case was subject to the ruling in *Karaczewski* because no final judgment had been entered. The WCAC affirmed, and the Court of Appeals denied leave to appeal. Bezeau appeals.

BREWER v A.D. TRANSPORT EXPRESS, INC., et al. ([case no. 139068](#))

Attorney for plaintiff Anthony J. Brewer: Daryl C. Royal/(313) 730-0055

Attorney for defendants A.D. Transport Express, Inc., and Accident Fund Insurance

Company of America: Gerald M. Marcinkoski/(248) 433-1414

Tribunal: Workers' Compensation Appellate Commission

At issue: A magistrate found that the plaintiff, a Michigan resident who suffered a work-related injury in Ohio, failed to meet his burden of proving that his contract of hire with the defendant employer was made in Michigan. The plaintiff's petition for worker's compensation benefits was

therefore dismissed. The plaintiff argues that 2008 PA 499, which gives jurisdiction to the worker's compensation agency for an out-of-state injury either if the claimant was a resident of Michigan at the time of the injury or if the contract of hire was made in Michigan, should be retroactively applied to his case. Should the legislative change to MCL 418.845, 2008 PA 499, be applied to this case?

Background: Anthony Brewer, a truck driver for A.D. Transport Express, Inc., alleged that he injured his lower back while on a delivery assignment in Defiance, Ohio on December 5, 2003. There is no dispute that at the time of the alleged injury, Brewer was a Michigan resident. A.D. Transport is headquartered in Canton, Michigan, with satellite offices in Kentucky and New Jersey; the company provides transportation services nationwide. At the time of Brewer's injury, the statute establishing the jurisdiction of Michigan's worker's compensation system over out-of-state injuries, MCL 418.845, stated: "The bureau shall have jurisdiction over all controversies arising out of injuries suffered outside this state where the injured employee is a resident of this state at the time of injury and the contract of hire was made in this state." This statutory provision was amended by 2008 PA 499, effective January 13, 2009, to read: "The worker's compensation agency shall have jurisdiction over all controversies arising out of injuries suffered outside this state if the injured employee is employed by an employer subject to this act and if either the employee is a resident of this state at the time of injury or the contract of hire was made in this state."

Brewer filed a worker's compensation claim against A.D. Transport, but the company denied that the contract of hire was made in Michigan, a prerequisite for Michigan worker's compensation jurisdiction over an out-of-state injury under the statute in effect in 2003. Brewer's payroll and employment records show the address of the corporate office in Canton, but the worker's compensation magistrate decided that these facts did not satisfy Brewer's burden of proof regarding where the contract of hire was made. The magistrate dismissed Brewer's petition; Brewer appealed to the Workers' Compensation Appellate Commission, which unanimously affirmed the magistrate's ruling. The WCAC explained that Brewer "suggests his Michigan residency, combined with the existence of at least one A.D. Transport location in Michigan, should allow for an inference that the contract of hire occurred in Michigan. We disagree. There were no facts submitted that would allow the magistrate to conclude the contract of hire was made in Michigan." The Court of Appeals denied Brewer's application for leave to appeal. Brewer appeals. He argues that, if in fact he failed to meet his burden of proving that his contract of hire with A.D. Transport Express was made in Michigan, the Supreme Court should apply the statutory amendment in 2008 PA 499 retroactively to his claim, thereby making him eligible for the receipt of worker's compensation benefits.

Afternoon Session

LEE v CITY OF DETROIT ([case no. 138091](#))

Attorney for plaintiff Michael C. Lee: Bertram L. Marks/(248) 862-1163

Attorney for defendant City of Detroit: Hyun (Grant) J. Ha/(313) 237-5036

Trial Court: Wayne County Circuit Court

At issue: The plaintiff, a police commander, was transferred from the Gang Enforcement Section of the police department to the Records and Identification Section. He sued, claiming that his transfer was in response to an internal complaint that he filed against his commander, and that his transfer violated the Whistleblower Protection Act. In response, the chief of police filed an

affidavit asserting that the plaintiff was transferred because he provided a poor response to her request for intelligence about Detroit's gangs. The trial court granted the city's motion for summary disposition, and the Court of Appeals affirmed. Did the plaintiff establish a genuine issue of material fact as to whether his internal complaint led to his transfer?

Background: Michael C. Lee, an African-American, was an 18-year veteran of the city of Detroit's police department and commander of its Gang Enforcement Section. In November 2004, Lee was transferred from the Gang Enforcement Section to the Records and Identification Section. Lee sued the city, alleging that this transfer violated the Whistleblower Protection Act. He claimed that, at a meeting on October 27, 2004, his direct supervisor, Commander George Hall, referred to him as a "nigger." On November 2, 2004, Lee filed a written complaint about the comment, asking the police department's EEOC office to launch an investigation. Later that month, Lee was transferred to the Records and Identification section. It is undisputed that Chief of Police Ella Bully-Cummings made the decision to transfer Lee. She provided an affidavit stating that she had asked Lee to provide her with intelligence about Detroit's gangs. In her affidavit, Bully-Cummings stated that Lee was transferred as a result of his failure to provide her with the requested information. Relying on this affidavit, the city filed a motion to dismiss the case, arguing that Lee failed to establish his Whistleblower Protection Act claim. Lee opposed the motion, and also filed a motion to amend his complaint to add a claim under the Michigan Civil Rights Act. The trial court granted summary disposition to the city on Lee's Whistleblower Protection Act claim, and denied as futile Lee's motion to amend, holding that Lee had not established causation under either statute. The Court of Appeals affirmed in an unpublished per curiam opinion. The panel explained, "[Lee] failed to provide evidence that Chief Bully-Cummings, who the evidence showed was solely responsible for [Lee's] transfer, knew that he threatened to file a lawsuit, or knew of his November 2, 2004 memorandum, before transferring [him]." While Lee demonstrated that his November 2, 2004 complaint and request for investigation occurred shortly before his transfer, the panel held that a temporal relationship, alone, does not establish a causal connection between the protected activity and adverse employment action. Lee appeals.

ROBINSON v CITY OF LANSING ([case no. 138669](#))

Attorney for plaintiff Barbara A. Robinson: Steven A. Hicks/(517) 394-7500

Attorney for defendant City of Lansing: Christine D. Oldani/(313) 965-3900

Attorney for amicus curiae Michigan Municipal League and Michigan Municipal League

Liability and Property Pool: Rosalind H. Rochkind/(313) 446-5522

Trial Court: Ingham County Circuit Court

At issue: The plaintiff tripped and fell on a sidewalk adjacent to a state trunk line highway. She sued the city under the highway exception to governmental immunity. The city sought to have the case dismissed, relying on the "two-inch rule" in MCL 691.1402a(2), which provides that a sidewalk with a discontinuity defect of less than two inches creates a rebuttable presumption that the municipality maintained the sidewalk in reasonable repair. But the trial court denied the city's motion, holding that § 1402a(2) applies only to county highways. In a published opinion, the Court of Appeals reversed, holding that subsection (2) is not limited to county highways. Did the Court of Appeals properly interpret § 1402a(2)?

Background: Barbara Robinson was injured when she tripped and fell while walking on the sidewalk in front of the Lansing Center, adjacent to Michigan Avenue, a state trunk line highway. She sued the city of Lansing, alleging that it breached its duty under MCR 691.1402(1) to

maintain the sidewalk in reasonable repair and in a condition reasonably safe for public travel. The city argued that it was protected from liability by the “two-inch” rule of MCL 691.1402a(2). Subsection (2) states: “A discontinuity defect of less than 2 inches creates a rebuttable inference that the municipal corporation maintained the sidewalk, trailway, crosswalk, or other installation outside of the improved portion of the highway designed for vehicular travel in reasonable repair.” Citing the statute, the city filed a motion for summary disposition under MCR 2.116(C)(7), claiming that it was entitled to judgment as a matter of law because Robinson had not shown that the sidewalk was not in reasonable repair. Robinson moved to strike the city’s § 1402(2) defense. Noting that subsection (1) of the statute stated that it applied only to “county highways,” Robinson argued that the same limitation applied throughout the statute and that, as a result, subsection (2) did not bar her claim, which concerned a state trunk line highway and not a county highway. The trial court agreed with Robinson; it granted her motion to strike and denied the city’s motion for summary disposition. But the Court of Appeals reversed the trial court’s ruling in a published per curiam opinion. The Court of Appeals held that, in contrast to subsections (1) and (3) of the statute, subsection (2) contains no language limiting its application to county highways. The Court of Appeals remanded this case to the trial court so that the lower court could rule on the remaining issues in the case; the Court of Appeals also noted that the city could refile its motion for summary disposition. Robinson appeals.

LENAWEE COUNTY BOARD OF ROAD COMMISSIONERS v STATE AUTO PROPERTY & CASUALTY INSURANCE COMPANY, et al. ([case nos. 137667-8](#))

Attorney for plaintiff Lenawee County Board of Road Commissioners: Jeffrey J. Juby/(517) 486-6209

Attorney for defendant State Auto Property & Casualty Insurance Company: Keith A. Schroeder/(517) 787-2620

Attorney for defendant Citizens Insurance Company of America: Mary T. Doll/(248) 233-5533

Trial Court: Lenawee County Circuit Court

At issue: The plaintiff sued two defendants in 2005, and in 2007 amended its complaint to add the defendants’ insurers. The insurers argued that the claims against them were untimely, and they filed motions for summary disposition, seeking to dismiss the claims based on the no-fault act’s one-year statute of limitations. The trial court denied the motions, reasoning that the insurers were involved with the defense of the case from the beginning, and that the amendment should relate back to the date that the complaint was originally filed. The Court of Appeals reversed, based on *Miller v Chapman Contracting*, 477 Mich 102 (2007), which held that the relation-back doctrine does not extend to the addition of new parties, even if the new party had notice of the claim when it was initially filed, and the new party and the initially named party had substantively identical interests. Was *Miller* properly decided? Are the insurers entitled to summary disposition?

Background: On June 2, 2006, the Lenawee County Board of Road Commissioners sued Briskey Brothers Construction, Inc. and Stan Slusarski Trucking & Backhoe, Inc. The board asserted that on June 30, 2005, Briskey and Slusarski drove across a bridge with loads in excess of posted weight limitations, damaging the bridge. At a hearing on Briskey’s and Slusarski’s motions for summary disposition, which claimed that Michigan’s no-fault insurance act was controlling, the trial judge ruled that the board would be allowed to amend its pleadings. On July 5, 2007, the board filed an amended complaint adding as defendants State Auto Property &

Casualty Insurance Company and Citizens Insurance Company of America, Briskey's and Slusarski's insurers. Briskey and Slusarski were subsequently dismissed from the lawsuit, leaving only the board's claims against the two insurers for recovery of property protection insurance benefits under the no-fault act. State Auto and Citizens filed motions for summary disposition, seeking to dismiss the case based on the no-fault act's one-year statute of limitations. The trial court denied the motions, reasoning that the insurance companies had been involved with the defense of the case from the beginning, so the amendment of the board's complaint should relate back to the date of the original 2005 filing. MCR 2.118(D) provides that an amendment that adds a claim or defense relates back to the date of the original pleading if the new claim or defense "arose out of the conduct, transaction or occurrence" set forth in the original pleading. The insurers sought leave to appeal to the Court of Appeals. In lieu of granting leave to appeal, the Court of Appeals peremptorily reversed the trial court. In the order, the panel concluded that the relation-back doctrine does not apply to the addition of new parties, citing *Miller v Chapman Contracting*, 477 Mich 102 (2007). The board's claims against the defendant insurers were therefore untimely, the Court of Appeals held, because the claims were filed after the expiration of the one-year statute of limitations. The board appeals.

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